

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

DUSTIN WEDEL, Individually and On
Behalf of All Others Similarly Situated,
Plaintiff,

v.

GYRO TECHNOLOGIES, INC.,
Defendant.

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CIVIL ACTION NO: 2:15-cv-00093

**DEFENDANT GYRO TECHNOLOGIES, INC.’ OPPOSED EMERGENCY MOTION TO
STAY MAGISTRATE JUDGE JASON LIBBY’S ORDER [D.E. 46] UNTIL
DISTRICT JUDGE NELVA GONZALES-RAMOS RULES ON DEFENDANT’S
EMERGENCY OBJECTIONS [D.E. 48]**

TO THE HONORABLE DISTRICT JUDGE:

COMES NOW, Defendant Gyro Technologies, Inc., pursuant to Fed. R. Civ. P. 62(b)(4), and respectfully files this Opposed Emergency Motion to Stay Magistrate Judge Jason Libby’s Order dated October 6, 2015 [D.E. 46], until District Judge Nelva Gonzales-Ramos Rules on Defendant’s Emergency Objections [D.E. 48], Defendant Gyro Technologies, Inc., would respectfully show as follows:

1. On September 8, 2015, Defendant’s counsel Frederick J. McCutcheon filed a Notice of Vacation requesting that no hearings be scheduled from October 2, 2015, through October 12, 2015. Defendant’s counsel is currently out of the country, and in a remote location of Costa Rica. [D.E. 36]. Plaintiff’s counsel had been notified of Defense counsel’s vacation several times by letter, by email and verbally.

2. Without prior notice or consultation as required by Local Rule 7.1(D), on October 2, 2015, Plaintiff filed an Emergency Motion for Protective Order and to Expedite and Approve Conditional Certification and a Corrective Notice to Potential Class Members [D.E. 39].

3. On October 5, 2015, the Court entered an Order Setting Hearing for October 6, 2015 [D.E. 40].

4. On October 6, 2015, George Schimmel, of counsel, appeared on behalf of the Defendant. Counsel explained to the Court that the attorney-in-charge, Frederick J. McCutcheon is out of the country and is unable to attend the hearing.

5. The Honorable Judge Libby agreed that aspects of the Plaintiff's motion should be defended by Mr. McCutcheon, and that a hearing would be set for October 19, 2015, to hear the merits of Plaintiff's motion. Notwithstanding such recognition by the Court that the Motion should be defended by Mr. McCutcheon, Magistrate Judge Libby proceeded to state that he was "concerned about the settlement offers" made by Defendant, followed by a characterization of such actions as "problematic," and then, "more than problematic." Following the hearing, the Court issued an Order [D.E. 46] which in tone and tenor comments prejudicially on Defendant's action, and on Mr. McCutcheon as counsel for Defendant, and is tantamount to judicial findings wholly prejudicial to Mr. McCutcheon's right to defend Plaintiff's motion.

6. Defendant respectfully requests this Court rule on Defendant Gyro Technologies, Inc.'s Emergency Objections to Magistrate Judge Libby's Order [D.E. 46], and until such ruling, that the Magistrate Judge's Order be stayed. Under Federal Rule of Civil Procedure 72, the District Judge may set aside the Magistrate's Order if the Judge determines that it is clearly erroneous or contrary to law. *See* Fed. R. Civ. P. 72(a). The "clearly erroneous" standard requires that the Judge affirm the decision of the magistrate judge unless "on the entire evidence the reviewing court is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)); *See also* Fed.R.Civ.P. 72(a).

7. This request is not for delay, but in order that justice may be done.

8. The Defendant will be irreparably harmed if required to comply with the Magistrate Judge's Order [D.E. 46], and to such extent should be afforded the right to file objections and obtain a ruling from this Court prior to compliance.

WHEREFORE, PREMISES CONSIDERED, the Defendant Gyro Technologies, Inc., prays that the Court will stay Order D.E. 46 until Defendant's Emergency Objections [D.E. 48] have been heard and ruled on by this Honorable Court.

CERTIFICATE OF CONFERENCE

The undersigned conferred with counsel on October 7, 2015, and he is opposed to this motion.

Respectfully submitted,
WOOD, BOYKIN & WOLTER, P.C.
Of Counsel

By: /s/ V.G. Schimmel

Frederick J. McCutcheon

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CERTIFICATE OF SERVICE

I hereby certify that on this the 9th day of October 2015, a true and correct copy of the foregoing has been forwarded to all parties as indicated below.

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